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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 757

IRVING FEINBERG AND MARK GODFREY,
Petitioners,
vs.

THE UNITED STATES OF AMERICA.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

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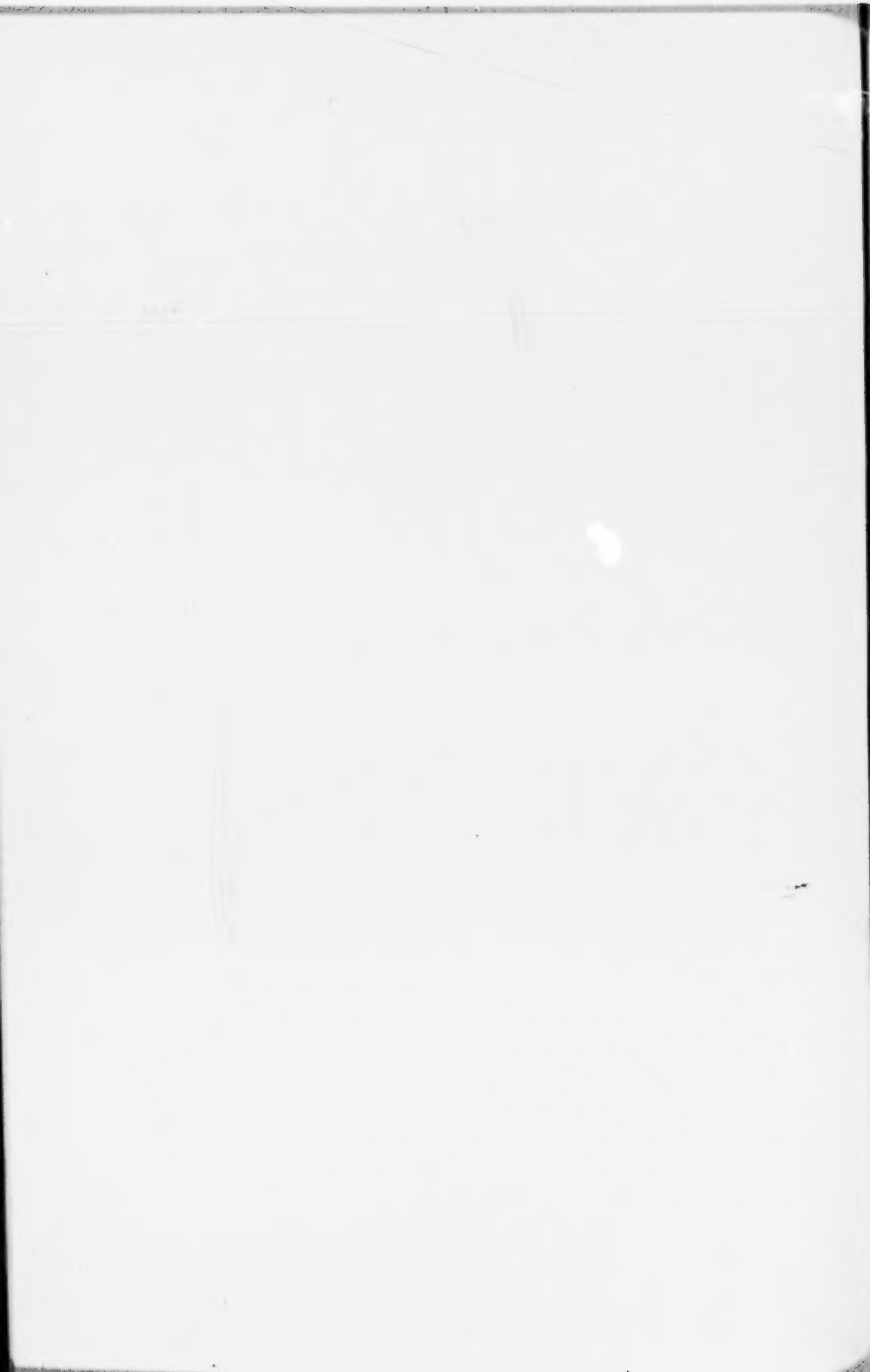
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*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:*

Your petitioners, Irving Feinberg and Mark Godfrey, respectfully submit their petitions for a writ of certiorari, to review the decree of the United States Circuit Court of Appeals for the Second Circuit in the above entitled cause, which affirmed a judgment of conviction in the United States District Court for the Eastern District of New York, in a case tried by the Hon. Marcus B. Campbell, United States District Judge, and a jury.

History of the Case.

The indictment in this case (Cr. 38514) was filed on November 19, 1941 against the petitioners and H. Vaughan Clarke and Prendergast-Davies Company, Ltd. It contained thirteen counts. Counts 1 to 8, inclusive, and Counts 10 to 12, inclusive, charged the petitioners and the other defendants with devising a scheme and artifice to defraud, and in furtherance thereof, of using or causing the United States mails to be used in violation of Title 18, United States Code, Section 338. Count 9 of the indictment charged the petitioners and the other defendants with the sale of stock in connection with said scheme by the use of the United States mails and means of transportation in interstate commerce, in violation of Title 15, United States Code, Section 77 q (a). Count 13 of the indictment charged the petitioners and the other defendants with conspiring to commit the offenses alleged in Counts 1 to 12, inclusive, in violation of Title 18, United States Code, Section 88.

The petitioners and the other defendants pleaded not guilty on the 1st day of December, 1941.

The trial began March 24, 1943 and continued through April 14, 1943.

During the trial, Counts 2, 5 and 8 of the indictment were dismissed by the Court with the consent of the Government (R. 6).

On April 14, 1943, the jury rendered a verdict of guilty against each defendant, except Prendergast-Davies Company, Ltd., on Counts 1, 3, 7, 10, 11 and 13, and not guilty on Counts 4, 6 and 9. No verdict was rendered as to Prendergast-Davies Company, Ltd. and the indictment against it was dismissed on motion of the Government (R. 6).

On April 22, 1943, petitioner Irving Feinberg, was sentenced to a term of imprisonment for a period of one

year and six months on each of Counts 1, 3, 7, 10, 11, 12 and 13, sentences of imprisonment to run concurrently, and to pay a fine of \$150 on each of Counts 1, 3, 7, 10, 11 and 12, and to pay a fine of \$100 on Count 13. The petitioner, Mark Godfrey and defendant, Clarke, were each sentenced to a term of imprisonment for a period of ninety days on each of Counts 1, 3, 7, 10, 11, 12 and 13, sentences of imprisonment to run concurrently and to pay a fine of \$150 on Counts 1, 3, 7, 10, 11 and 12, and to pay a fine of \$100 on Count 13. Each petitioner stands committed until said fines are paid or otherwise discharged according to law, and without costs (R. 1247-1250).

Notice of appeal was filed by each of the petitioners on the 22nd day of April, 1943. Irving Feinberg was released on bail of \$5,000 and Mark Godfrey was released on bail of \$2,000 on that date, pending appeal (R. 1545-1547). On the 17th day of May, 1943, the defendant H. Vaughan Clarke, surrendered to the United States Marshal for execution of his sentence and did not appeal.

An appeal was duly taken by the petitioners from the judgments of conviction to the United States Circuit Court of Appeals for the Second Circuit (R. 1509). It was stipulated and agreed between the United States Attorney and the attorney for the petitioners that the original Exhibits 1 to 28, inclusive, Exhibits 31, 36, 37, 44, 54, 61, 126 a, b, c, d, e, and 161, marked in evidence at the trial, need not be printed in the Bill of exceptions and record with the same effect as though complete copies thereof were set forth and made a part thereof; and that, with respect to Exhibits 1 to 28, inclusive, either party may, upon any argument herein in any Court of review, present the original of each of said exhibits; and then, with respect to Exhibits 31, 36, 37, 44, 54, 61, 126 a, b, c, d, e, and 161, three true and correct copies of each of said exhibits shall be filed a part of the transcript of record in the form of a supplementary

volume containing a list enumerating the exhibits therein, which shall be cross-referenced appropriately in the Printed Record (R. 1507).

The Circuit Court of Appeals affirmed the judgments so appealed from on January 31, 1944; and the issuance of the mandate thereunder was stayed, pending this application, by order of the Circuit Court of Appeals for the Second Circuit on February 7, 1944. The opinion of the Circuit Court of Appeals was written by Hon. Learned Hand and was concurred in by all the Judges. Petition for rehearing was filed on February 9, 1944 and was denied, per curiam, on February 14, 1944. The Circuit Court's order for a mandate of affirmance is dated February 16, 1944 (R. 1568-1569).

This petition is filed to obtain a review of the decision of the United States Circuit Court of Appeals for the Second Circuit.

Statement of Facts.

In the summer of 1938, Edwin C. McCullough, the President of the American Beverage Corporation and the owner of the controlling stock thereof, told his Vice-President, Dennis J. Killian, that the liquor business of the corporation was not profitable because of the lack of volume, and that he would like to acquire Prendergast-Davies Company, Ltd., and its sales force (R. 303, 304, 799). American Beverage Corporation was a wholesale liquor distributor and a manufacturer and distributor of carbonated beverages. In the liquor field, American Beverage Corporation and Prendergast-Davies Company, Ltd. were competitors in the New York area. The annual business of Prendergast-Davies Company, Ltd., was between three and one-half and four million dollars (R. 682). Conversations followed with Feinberg, who was the President of Prendergast-Davies Company, Ltd., but no deal

was consummated. Later that year, one Stemmler, who was a director of American Beverage Corporation, informed McCullough that Clarke and Godfrey, who were President and General Manager, respectively, of the Kinsey Distilling Company of Philadelphia, were interested in effecting a merger of the American Beverage Corporation and Kinsey Distilling Company. Thereafter meetings were held by the parties but nothing developed therefrom (R. 808).

Thereafter, Clarke negotiated with McCullough and Stemmler, who represented McCullough, for the purchase of the 72,000 shares of the common capital stock of the American Beverage Corporation, owned and controlled by McCullough (R. 808, 809). As a result of these negotiations, McCullough agreed to sell the 72,000 shares for \$250,000 and gave a fifteen day option to Stemmler, dated December 2, 1938 (Government's Exhibit 110). Stemmler, on the same day, assigned this option to Clarke, who in turn, assigned it to Feinberg (R. 810) (Government's Exhibit 81).

Prior to the expiration of this option (Government's Exhibit 110), Clarke arranged with McCullough for a new thirty day option upon the payment of \$10,000. On December 15, 1938, McCullough, at the offices of Stemmler, executed and delivered to Clarke an option running to the petitioner Feinberg, President of the Prendergast-Davies Company, Ltd. (Government's Exhibit 113), and received \$10,000 (R. 815-818).

On January 14, 1938, Prendergast-Davies Company, Ltd. paid to McCullough Corporation \$240,000, the balance of the purchase price for the 72,000 shares of the common stock of the American Beverage Corporation and, thereupon, it acquired title to said stock (R. 852, 853).

At this time, Feinberg and his wife also owned about 80 per cent of the stock of the Graves Companies, which

companies, in the past, had bought considerable whiskey in bulk from the Kinsey Distilling Company. The latter company held warehouse receipts as securities against the whiskies so sold.

On January 17, 1939, the regular annual meeting of the stockholders of American Beverage Corporation was held as provided for in its original By-Laws; and, at this meeting, the 72,000 shares of stock which had been purchased by Prendergast-Davies Company, Ltd. was voted for a new slate of directors consisting of the petitioner Feinberg, an excellent merchandising and liquor man (R. 371, 574, 683), George J. Mintzer, the attorney for Prendergast-Davies Company, Ltd., and a former Assistant United States Attorney for the Southern District of New York, Dennis J. Killian, the Vice-President and a director of the American Beverage Corporation for many years, H. Vaughan Clarke, the President of the Kinsey Distilling Company, the petitioner, Mark Godfrey, General Manager of the Kinsey Distilling Company, Thomas J. Hughes, an officer of Readville Distilleries, Inc. a distilling corporation with offices at Boston, Massachusetts, which had also sold large quantities of liquor to Graves, and Lester Lipschutz, an attorney in the State of Pennsylvania (R. 311, 1272).

At the meeting of the Board of Directors which followed that afternoon, there was submitted a written offer by Prendergast-Davies Company Ltd. in which it offered to American Beverage Corporation all its assets, business and good-will (excepting the 72,000 shares of the common stock of the American Beverage Corporation), together with 81,429 shares of stock of the Graves Companies, in consideration of American Beverage Corporation assuming all the liabilities of Prendergast Davies Company, Ltd. The offer (Government's Exhibit 40) had attached to it a statement of assets and liabilities of both com-

panies as of October 31, 1938. This offer specifically set forth that there was a deficiency between the assets and liabilities but declared that the following items more than made up for that difference; the good will of the business (its sales were near the four million dollar mark); its exclusive agencies for the distribution in the Metropolitan area of stated wines and liquors and of all the Graves products. None of these items was included in the attached statements as an asset.

Feinberg and Mintzer, the latter the counsel of Prendergast-Davies Company, Ltd., both announced that they would neither participate in the discussion of the offer nor vote thereon (R. 1275). The minutes of the meeting show that a complete discussion of the offer was had and all factors carefully weighed. The offer was accepted (Government's Exhibit 43).

In February, 1939, it was ascertained that the Graves Company had lost money in November and December of 1938 and that, therefore, the Graves stock transferred to American Beverage Corporation was worth less than \$128,650 which had been the value at which the stock had been taken by American Beverage Corporation. Thereupon, Prendergast-Davies Company, Ltd., through Feinberg, offered to turn over to American Beverage Corporation the 72,000 shares of American Beverage Corporation as collateral security to protect it against any loss on that account. An agreement was then prepared by the law firm of Breed, Abbot and Morgan, acting through Mr. Charles H. Tuttle and on behalf of American Beverage Corporation, providing for such security. The stock was turned over to American Beverage Corporation, pursuant to such agreement (R. 362-365).

The Board of Directors of American Beverage Corporation in the meantime, had appointed a committee to visit the Graves' plant and bring back a report about its

situation. This report was delivered to the Board on February 14, 1939. It showed that the overhead of the Graves Company was too high; that it could increase the volume of its business to the necessary amount if it had more cash; that the plant was in good condition and valuable; that it had spent \$250,000 in advertising, too much money for finance charges and for carrying some real property. The value as at December 31, 1938 was stated by the firm's accountants to be approximately 72,000, exclusive of its goodwill (Government's Exhibit 50).

On February 14, 1939, Feinberg resigned as President of American Beverage Corporation; on September 11, 1939 he resigned as a director thereof; in November, 1940, he completely severed all connections therewith, while Prendergast-Davies Company, Ltd. at the same time released all its right, title and interest in and to the 72,000 shares of stock which had been deposited as collateral (R. 1314, 381, 382), Godfrey remained as a director until January 17, 1940.

It is the contention of the Government that the defendants schemed to defraud American Beverage Corporation and its minority stockholders through a plan which provided for Feinberg to persuade the creditors of Prendergast-Davies Company, Ltd. not to press their claims and, in this way, build up a large bank deposit which could be used for the purchase of the control stock of American Beverage Corporation. Thereafter, he was to elect directors who were to approve the plan providing for the purchase by American Beverage Corporation of Prendergast-Davies Company, Ltd. and the control of Graves in exchange for the assumption of the Prendergast-Davies Company, Ltd.'s liabilities of about \$900,000. The fraud was alleged to lie in the fact that the value of the property received by American Beverage Corporation was much less than the amount of liabilities assumed. That

issue was hotly contested. The defense claimed that it had openly stated that tangible property was less than the liabilities of Prendergast-Davies Company, Ltd. but that the deficiency was more than made up by the value of the good-will. The Government maintained that since both Prendergast-Davies Company, Ltd. and Graves had recently been losing money, there was not any good-will, despite the volume of business being done, the past profitable records of Prendergast-Davies Company, Ltd. and Graves, their valuable contracts and the existing reasons for losses, to wit: price wars, and high advertising expenses.

It is the contention of the petitioners that there was no criminal intent on their part; that they acted in good faith throughout the transactions; that in January, 1939, at the time when the purchase of the American Beverage Corporation stock was consummated, American Beverage Corporation received at least as much as it paid; that the plan of the petitioners was to merge the companies involved so as to have their combined business operate under an overhead of one company; that the issues were so close that, in the words of the Circuit Court of Appeals the "jury might have decided either way" (R. 1554). Therefore, errors at the trial which created prejudice, bias, and an unwarranted picture of the petitioners became so serious that the conclusion must be reached that there was a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of this Court.

The Questions Presented.

1. Were the actions, conduct and methods employed and statements made by the Prosecuting Attorney so prejudicial to the petitioners' right to a fair trial as to call for the exercise of the power of supervision of this Court?

2. Did the admission of the annual reports of the American Beverage Corporation for the fiscal periods ending November 30, 1939 and November 30, 1940, respectively, constitute such error as to prejudice the rights of the petitioners to a fair trial?

3. Were the books of Prendergast-Davies Company, Ltd., the Graves Companies and the American Beverage Corporation properly admitted in evidence?

Reasons for Granting Petition.

(a) The Prosecuting Attorney, during the course of the trial and in his closing address, maliciously and unjustifiably linked the petitioners with a notorious gangster and racketeer by the name of John Torrio.

(b) The Prosecuting Attorney, in his opening address, stated that petitioner Feinberg, at some other time had violated the laws relating to distilled spirits and that petitioners had concealed that fact from the stockholders of American Beverage Corporation and repeated the same in his closing address, despite the fact that there was no proof thereof and the petitioners had not taken the stand.

(c) That in his closing address, the Prosecuting Attorney referred to certain adverse newspaper publicity relating to some other indictment of Feinberg in a manner calculated to convey to the jury the impression that the petitioners had suppressed that fact from the stockholders of American Beverage Corporation, whereas, in truth, such indictment had been found after the completion of the alleged scheme and all of which formed no part of the testimony.

(d) That the Circuit Court of Appeals, in its opinion, showed that it had been misled as a result of these remarks by the Prosecuting Attorney when it stated that the com-

ments of the Prosecuting Attorney "would have been improper if the (newspaper) articles themselves had been incompetent; but, as they were not, no harm was done" (R. 1556). Since the articles which referred to an indictment found subsequent to the alleged scheme herein obviously would be inadmissible, the quoted language of the Circuit Court of Appeals emphasized the misapprehension of that Court concerning the seriousness of the error.

(e) The Prosecuting Attorney, in his summation, indicated to the jury, by his conduct and words, that he was quoting from actual testimony, whereas his quotations blackening the motives of petitioners, did not come from the testimony but were misquotations and misstatements concerning such testimony.

(f) The Circuit Court of Appeals stated, in its opinion, that the closing address of the Prosecuting Attorney was vulgar, in bad taste and violent.

(g) The admission of the annual reports of American Beverage Corporation for the fiscal periods ending November 30, 1939 and November 30, 1940 were error and calculated to convey the impression to the jury that the business losses of American Beverage Corporation after the new Board of Directors, of which petitioners were members, was elected, were the result of illegal and wrongful acts by the petitioners. The Circuit Court of Appeals conceded this admission of the statement of 1940 to be error but concluded that it would be unwarranted to reverse because of so trifling a single lapse. The books offered in evidence as the books and records of the Graves Companies, American Beverage Corporation and Prendergast-Davies Company, Ltd. were the books and records of those companies; and if there was no such stipulation, no proper foundation had been laid by the Government for their admission, and so

they were not admissible. The Circuit Court, in its opinion, stated that the computations taken from such books were "a vital part of the case, and that they were incompetent, unless the books themselves were competent" (R. 1557). The Circuit Court stated that there was such a stipulation and erroneously interpreted the words of counsel to arrive at such conclusion.

It is respectfully submitted that the issues were so closely contested, the question of intent so finely balanced, the value of assets, tangible and intangible, so dependent upon the character and motives of the petitioners, that the cumulative effect of the errors affecting these matters resulted in depriving the petitioners of a fair trial and warrants the exercise of this Court's power of supervision and a review of the judgments.

WHEREFORE, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding the said Court to certify the case to this Court for review and determination, as provided by the statutes of the United States; and that your petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

Dated: City of New York, New York, March —, 1944.

GEORGE WOLF,
Attorney for Petitioners.

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